PUBLIC SAFETY
PSWN PROGRAM
WIRELESS NETWORK

Saving Lives and Property Through Improved Interoperability

Siting of Communications Towers

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EXECUTIVE SUMMARY

Numerous legal and regulatory issues are having a significant impact on the telecommunications industry. One such issue relates to tower siting. More specifically, federal environmental, historical, and other laws and regulations affect the approval process for wireless tower siting and construction. Among these regulations are the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and the Endangered Species Act (ESA). The public safety community must recognize that these regulations apply equally to government and commercial wireless systems.

On January 23, 2002, a national training seminar, entitled "Federal Environmental and Historic Preservation and the Siting of Communications Towers," was held at the Hilton Hotel in Alexandria, Virginia. This daylong seminar focused on the impact and interaction of these regulations. The key findings and recommendations resulting from the session discussions include—

- Public safety agencies should adopt strategies for achieving compliance under the Federal Communications Commission's (FCC) Environmental Assessment (EA) process, i.e., mitigating any significant environmental effects, if they occur, and preparing a detailed record for submission to demonstrate consideration of environmental factors.

- The FCC has final authority to approve or reject a proposed communications tower construction project.

- The FCC should establish uniform compliance procedures for information that public safety agencies must submit to achieve compliance with NEPA requirements.

- Under the key provisions of the NHPA, all necessary local, state, federal, and tribal parties must participate in the identification, evaluation, and consultation processes to meet the prerequisites for approving construction projects.

- Section 106 of the NHPA details the consultation process of negotiation with tribal nations.

- The Council on Environmental Quality (CEQ), an independent agency in the Executive Office of the President, works with local, state, federal, and tribal authorities to coordinate compliance efforts and recommends and regulates environmental policy for the President.

- Public safety agencies planning construction in an area where threatened and endangered species and critical habitats may be affected must consider the ESA and the Migratory Bird Treaty Act (MBTA) and take all necessary actions to mitigate potential environmental impact.

1. INTRODUCTION

Presentation Overview

On January 23, 2002, a national training seminar, entitled "Federal Environmental and Historic Preservation and the Siting of Communications Towers," was held at the Hilton Hotel in Alexandria, Virginia. This daylong seminar focused on the impact and interaction of the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), the Endangered Species Act (ESA), and other federal laws that affect the approval process of wireless tower sites and construction. The Perkins Coie, LLP, a telecommunications law firm, the Personal Communications Industry Association (PCIA), and Sprint PCS jointly sponsored the seminar. Panelists and attendees included Federal Communications Commission (FCC) staff, representatives from tower construction firms, several telecommunications carriers, consulting firms, and legal practitioners for several agencies and private industry. In support of the Public Safety Wireless Network Program, two Booz Allen Hamilton staff members, Robert DeLauney and Robert Giarrusso, attended the seminar.

The information that follows is a detailed summary of the opening remarks, keynote speakers' addresses, and the six sessions, each of which concentrated on the different legislation that applies to tower construction and the steps required to meet the federally mandated requirements under each. The speakers reviewed the NEPA, NHPA, ESA, tribal consultation requirements, and other environmental and historical policies that apply with equal force to both government and commercial wireless systems, including law enforcement and other public safety users. The speakers also emphasized that the law required only a good-faith consideration of these factors by all users. The FCC remains the ultimate arbiter of licensing issues, and countervailing concerns, including economic and security issues, that may outweigh environmental and historical considerations in licensing wireless sites. In addition to a review of the training sessions, the course book has been submitted to the TRC Library for future reference. Specifically, the course book contains the relevant law, approval process diagrams, the slides presented at the seminar, and a list of the attendees.

2. OPENING REMARKS

Synopsis

The seminar began with a brief greeting from the hosts, who discussed their respective interests in the subject of environmental regulation of communications towers. They discussed the state of the communications industry, the role of the FCC in regulating industry development, and the impact of environmental laws that apply to tower construction projects.

Speaker Information

The three hosts of the seminar, Sprint PCS, PCIA, and Perkins Coie, LLP, were each represented by speakers, who welcomed the attendees.

Jim Meyers is Assistant Vice President of Site Development, Sprint PCS. He is responsible for site acquisition, construction, and management of Sprint facilities in 29 states. He has also worked with PrimeCo Personal Communications and AT&T Wireless, and as an investment banker in the Federal Republic of Germany.

Jay Kitchen is the President and Chief Executive Officer of PCIA. He served as vice president and president of the National Association of Business and Educational Radio (NABER) for 17 years, until NABER merged with PCIA in 1994. He also spent 9 years as a staff engineer with the FCC and as engineering assistant to FCC Commissioners Charlotte Reid and Margita White.

Guy Martin, Esq., of Perkins Coie, LLP, represented the other co-host of the seminar. He is a senior partner in that firm, whose law practice concentrates in the field of telecommunications. He is Co-Chair of the firm's Environmental Practice Group, and has worked with Native American landowners on facility siting issues and with Native Alaskans regarding rights-of-way for resource development and access to Native properties.

Presentation Overview

Each speaker made brief statements about the focus of the conference, and the FCC's role in enforcing environmental statutes. They also discussed the state of the telecommunications and tower site industries.

Mr. Meyers began by stating that opposition to the cellular communications industry and that frequent litigation had a negative effect on the growth of the wireless industry. He acknowledged that cell site coordination was becoming increasingly complicated and time consuming, with more time and money being spent in resolving the legal issues surrounding tower deployment than ever before. Mr. Meyers said that the seminar would primarily examine NEPA, the NHPA, and Native American tribal consultation requirements that must be observed in the approval process for communications tower construction.

Mr. Kitchen provided some historical background on the cost of regulation, discussing tower siting fees. At one time, flat fees of $500 were assessed for each tower. Later, the U.S. Forest Service performed site-by-site appraisals that assessed the revenue from each tower, and charged 25 percent of the annual revenues from each antenna on the wireless towers.

Mr. Kitchen stated that as the wireless industry evolved, and these costs became more dramatic, many smaller operators and carriers sold their tower sites to major corporations. After giving some background on the PCIA, Mr. Kitchen stated that the organization was experienced in navigating state and federal regulations that applied to tower sites, which were rapidly growing in importance. He also noted that the FCC had been diligently investigating non-compliance and levying serious fines on companies violating their rules.

Mr. Martin noted that this seminar had been rescheduled after its initial date of September 11, 2001, commenting on how far everyone had come since then to resolve communications issues. He remarked favorably on the heavy turnout. Mr. Martin reiterated that the seminar would deal with legal and environmental issues pertaining to construction of communication towers and said that particular emphasis would be given to discussing Section 106 of the NHPA.

Summary and Analysis

The opening remarks provided a summary of the legal and regulatory issues that would be reviewed during the training sessions. It was clear from the opening that federal environmental, historical, and other regulations are having a significant impact on the telecommunications industry.

3. SESSION I—An Overview of Federal Regulation of the Siting of Communications Towers

Synopsis

Session I reviewed significant environmental protection statutes, emphasizing NEPA, when and how the Act applied, and the need for consideration of environmental factors when applying to the FCC to build communications towers.

Presenter Information

John Clark, Esq., is Of Counsel with Perkins Coie, LLP. He is experienced in issues pertaining to the federal regulation of communications towers and infrastructure supporting wireless telecommunications, broadcast, and Internet industries. He also serves as outside counsel to the PCIA, and the PCIA Site Owners and Management Alliance (SOMA). He is a participant in the Advisory Council on Historic Preservation's (ACHP) Telecommunications Working Group, currently drafting a programmatic agreement to govern the NHPA's Section 106 process for the telecommunications industry. He also contributed to drafting the Nationwide Programmatic Agreement on the Collocation of Wireless Antennas (NCPA).

Presentation Overview

Session I outlined NEPA, and the FCC's regulations that must be observed in the approval process to authorize construction of communications towers. The speaker discussed primary provisions of the Act, including the general requirement to submit an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) to demonstrate adequate consideration of the environmental effects of the project on the relevant area. He listed several categories of actions that were excluded from this requirement, other law and regulatory agencies that were involved in the approval process, and procedure in cases that were contested.

Mr. Clark provided some history and background on NEPA (42 U.S.C. 4321–4335). The Act represents the first comprehensive national environmental program developed by the Congress "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality (CEQ)" (Congressional declaration of purpose, 42 U.S.C. 4321).

NEPA is intended to apply to private parties, as well as corporate and government actors. Federal agencies are directed to administer the Act using "a systematic and interdisciplinary approach," and to identify and develop processes and procedures to "insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations" (42 U.S.C 4332). The agencies also are required to police their own actions to comply with the act. The agencies originally construed the Act narrowly but later they interpreted it more expansively, supplementing the agencies' powers. At first, the FCC's involvement with the compliance and

enforcement process was limited. However, as regulations have developed and NEPA issues have been refined, the FCC has taken a more "hands–on" approach.

The FCC's environmental regulations, codified at 47 CFR 1.1301–1.1319, implement the Act. Mr. Clark noted many changes in the agency's regulations since the first NEPA Order was made in 1974. The FCC released subsequent Orders in 1977, 1986, 1988, 1990, and 1995 that incorporated additional changes. These included the removal of the exemption for tower construction projects valued under $100,000, adding the definition of "significant effect" on the environment, and eliminating the requirement that the FCC prepare an applicant's EA (47 CFR 1.1307). The Act clearly makes the applicant responsible for demonstrating examination and consideration of the environmental effects of a tower project, subject to the agency's verification of information and statements made in the process.

The FCC's regulations typically require either an EA, or in contested cases, an EIS, by any party constructing a communications tower. Both require adequate investigation and a conclusive determination on the record to warrant a finding of "no significant effect." If an EA demonstrates sufficient consideration, the applicant can usually avoid the more onerous EIS procedure. Title 47 CFR 1.1311 specifies that the following information must be included in an EA: a description of the facilities, a statement regarding the zoning classification of the site, whether the planned project has been controversial in the community, the environmental factors that led to that site being chosen, whether the site has any endangered or protected species or critical habitats that will be affected, and any other information the appropriate FCC bureau or the Commission may request.

Title 47 CFR 1.1307(a) states—

> "Commission actions with respect to the following types of facilities may significantly affect the environment and thus require the preparation of EAs by the applicant and may require further Commission environmental processing" (references omitted). "This includes:
>
> 1) facilities that are to be located in an officially designated wilderness area.
> 2) facilities that are to be located in an officially designated wildlife preserve.
> 3) facilities that (i) May affect listed threatened or endangered species or designated critical habitats; or (ii) are likely to jeopardize the continued existence of any proposed endangered or threatened species or are likely to result in the destruction or adverse modification of proposed critical habitats as determined by the Secretary of the Interior pursuant to the Endangered Species Act of 1973.
> 4) facilities that may affect districts, sites buildings, structures or objects, significant in American history, architecture, archaeology engineering, or culture, that are listed or eligible for listing in the National Register of Historic Places.
> 5) facilities that may affect Indian religious sites.
> 6) facilities to be located on a flood plain.

7) facilities whose construction will involve significant change in land surface features.
8) antenna towers and/or supporting structures that are to be equipped with high intensity white lights which are to be located within residential neighborhoods, as defined by the applicable zoning laws."

Note that there is no automatic requirement for an EA in cases involving strictly aesthetic concerns; however, parties may raise objections on those grounds under the safeguard provisions of § 1.1307 (c) and (d), to be decided by the FCC on a case-by-case basis.

In addition to the information to be included in the EA under 47 CFR 1.1311 listed above, projects affecting some of the categories of facilities mentioned require other agencies to participate in the review process. If "facilities that may affect threatened or endangered species or critical habitats" (47 CFR 1.1307 (a)(3)), or "facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archaeology, engineering or culture, that are listed or are eligible for listing in the National Register" (47 CFR 1.1307 (a)(4)) are proposed, "the Commission shall solicit and consider the comments of the Department of the Interior, and the State Historic Preservation Officer and the Advisory Council on Historic Preservation (ACHP), respectively, in accordance with their established procedures."

Under 47 CFR 1.1307 (b), the FCC requires an EA in the event that the construction of facilities, equipment authorization, or modification to an existing facility would "cause human exposure to levels of radio frequency (RF) radiation in excess of the limits in §1.1310 or §2.1093." Mr. Clark interjected that because this clause applied to emissions, tower construction companies should logically be exempt from these requirements. Additionally, 47 CFR 1.1307 (c) provides guidance to interested parties on how to submit a petition alleging environmental impact. If the responsible FCC bureau or the Commission finds potential for "a *significant* environmental impact" (emphasis added), the applicant must submit an EA, to be used in determining whether environmental processing is necessary.

No action automatically requires the preparation of an EIS; it must be prepared only in the case of events that "*will have a significant impact upon the environment"* (47 CFR 1.1305) (emphasis added). The EIS is also often required when the initial findings of an EA are challenged by the FCC, usually for failure to demonstrate adequate consideration of environmental factors on the record. The requirements of an EIS are codified at 47 CFR 1.1314–1.1317. The EIS is prepared by the FCC, first in draft form, and contains a concise description of the proposed action, the nature of the area affected, its uses, the environmental analysis that has been made, and its expected short and long-term effects on the human environment. It is announced in the Federal Register by the Environmental Protection Agency (EPA) and released for public comment. After the comment period expires, the responsible FCC bureau prepares the Final EIS (FEIS). The case may be ruled on by an administrative law judge, or by the FCC, for final disposition.

There is a narrow group of "Categorical Exclusions" (47 CFR 1.1306 (a) and (b)), which do not require EA or EIS preparation. Note 1 to 47 CFR 1.1307 (a) specifically relates to collocation on existing antenna towers, and the FCC recommends this practice where possible as

"an environmentally desirable alternative to the construction of new facilities." Other notes describe similar exemptions for modifications of existing uses or structures that the FCC has ruled "will not be sufficient to warrant additional environmental processing."

In addition to the restrictions of NEPA, the NHPA, ESA, and other environmental laws apply to tower siting. Mr. Clark further stated that these laws usually applied *prior* to site construction, although it was not always clear what effect a tower might have until it was operational. The effect of these laws after the site was built is unclear. He suggested this was one area that the FCC should clarify, refining its regulations to make compliance and enforcement less subjective.

Summary and Analysis

NEPA applies to all FCC applicants for communications tower construction approval. Although some projects may be subject to exclusions from the Act, in most cases submission of an EA is necessary to demonstrate consideration of the necessary environmental factors. If the findings of an EA are contested, a full EIS investigation and determination may be required. As with all commercial and private sector applicants, these conditions also apply to the construction of state and local public safety towers; however, the National Telecommunications and Information Administration (NTIA) would enforce the Act's provisions when construction is planned by federal agencies. To reduce the time and expense associated with complying with these regulations, public safety agencies should adopt strategies for achieving compliance under the EA process, i.e., mitigating any significant environmental effects if they occur, and preparing a detailed record for submission to demonstrate consideration of environmental factors.

4. SESSION II—The National Environmental Policy Act and Regulations of the Council on Environmental Quality

Synopsis

Session II focused on the National Environmental Policy Act of 1969 (NEPA) and how it applies to communications tower construction applicants. The EA and EIS process was considered, and Mr. Cohen discussed agency review and enforcement procedures. The speaker also examined case law interpreting NEPA regulations and procedures, and the role of the FCC and the federal courts.

Presenter Information

William C. Cohen, Esq., is Of Counsel with Perkins Coie, LLP. He is also an adjunct professor at the Washington College of Law at the American University. Mr. Cohen spent 35 years with the U.S. Department of Justice (DOJ), practicing primarily in the environmental and natural resources fields. He was the General Litigation Section Chief, and lead litigation attorney for the Federal Government for all NEPA cases, as well as those involving major projects affecting federal lands and resources.

Presentation Overview

Session II expanded on the topics discussed in Session I including a review of NEPA and the related regulations, the EA and EIS processes, and environmental litigation. Mr. Cohen also discussed those actions that were exempt from regulation and the impact that NEPA had on federal agencies and other entities.

Mr. Cohen started this session by mentioning the impact of Rachel Carson's book, *Silent Spring*, which, when it was first published, focused attention on the widespread use of toxic chemicals and the need for proactive government policies to protect the environment. In part as a response to the sudden preoccupation with these issues, NEPA became law on January 1, 1970. Many other nations modeled subsequent environmental protection and enforcement schemes on NEPA, and it remains influential to this day. NEPA does not require federal agencies to choose the "most environmentally desirable alternative" in constructing communication tower sites, but instead requires performing a good-faith analysis and consideration of environmental factors and how the proposed development would affect them.

Mr. Cohen explained that most federal agencies resisted compliance with NEPA and did so at their peril. NEPA litigation often ensued because agencies argued for an overly narrow interpretation of the law to avoid regulation. There has been a constant backlog of about 475 active NEPA cases at any given time for the last 10 years. The agency most often in litigation over these statutes was the U.S. Forestry Service, and the Food and Drug Administration and the old Atomic Energy Commission (predecessor to the Nuclear Regulatory Commission) were also frequently targeted for violating NEPA.

Mr. Cohen turned his attention to compliance procedures and the litigation that occurred when construction projects were not approved. He reminded attendees an EIS was not required *per se* for any project, providing the necessary environmental consideration was demonstrated,

i.e., the EA was sufficient. He remarked that developers wanted the federal agency requirements to clearly reflect the NEPA and to be interpreted and enforced consistently. He suggested a uniform policy that incorporated and clarified the responsibilities applicable to tower site projects and included relevant portions of NEPA, the ESA, NHPA, and tribal law, would simplify planning. Developers also wanted to avoid litigation, and needed clearer direction from the FCC and other agencies at the outset, to avoid costs and delays. Mr. Cohen encouraged the developers to participate in the agency approval process from the beginning, to help address any concerns, ensure compliance with NEPA, and establish a detailed record if further agency intervention, or judicial review, was required.

Mr. Cohen stated that the key to satisfying NEPA was in Section 102 (42 U.S.C. 4332), which imposes a mandate on federal agencies to include "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" detailed statements describing the environmental impact of the proposed action, any unavoidable adverse environmental effects of the proposed action, and other alternatives. The speaker then analyzed how and when an EA was performed by an agency to determine whether an EIS needed to be done.

If the EA shows that a significant impact *will* be caused by the proposed action, then an EIS must be prepared. If an applicant submits a "finding of no significant impact," or "FONSI" (NEPA Section 1508.13), and it is not contested, no further action needs to be taken. The guidelines for determining the proper findings when performing an assessment are in the regulations, and a FONSI conclusion cannot be legitimately reached without adequate support on the record. Approximately half of the NEPA cases currently in litigation involve FONSI issues.

NEPA cases typically request emergency relief from the court, such as temporary restraining orders or injunctions to prevent imminent action. In these circumstances, tower construction companies, wireless carriers, and other interested parties can file amicus briefs to express the company's perspective and to help the court in making a decision by providing it with the most complete record available. Mr. Cohen cautioned that in those cases where evidence was insufficient to support the FONSI finding, reviewing courts could and did issue injunctions and restraining orders to enjoin construction projects.

Although about 400 to 500 EISs are filed annually, approximately *50,000* EAs are submitted each year. One reason for this disparity is the efforts taken to mitigate the significance of a project's environmental impact, which may help to avoid performing an EIS. The intended outcome is for designers and planners working on tower construction projects to minimize compliance issues, show adequate consideration of the effects on the environment, and provide possible alternatives to the proposed action, in advance. However, a stronger showing of mitigation and reduction of impact must be maintained and supported in an EA than would be necessary in an EIS. The FCC makes the final determination of whether a communications tower will be approved, and a "substantial effect on the environment" is *not* necessarily fatal to a tower construction project. Because other considerations, including economic and national security interests, may outweigh environmental concerns, projects are routinely approved even when an adverse effect is demonstrated.

A narrow class of actions never requires submission of an EA or an EIS. Part 1508.4 defines a categorical exclusion as "actions which do not individually or cumulatively have a significant effect on the human environment, and which have been found to have no effect in procedures adopted by a Federal agency in implementation of these regulations…and for which, therefore, neither an environmental assessment nor an environmental impact statement is required…" Mr. Cohen stated that when such an exclusion applied, an applicant must clearly indicate to the FCC that the proposed project was exempt from NEPA requirements for that reason.

Several important court decisions illustrate the interpretation and development of environmental regulations. They are important for establishing precedent in three distinct areas regarding interpretation and enforcement of environmental statutes. The first line of cases discusses the proper role of the courts in reviewing administrative review agency decisions. In the case of Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978), the U.S. Supreme Court clarified the obligation under NEPA for the reviewing agency to make a well-informed decision in reviewing compliance. A court cannot substitute its judgment for that of the agency if the record shows adequate consideration of the facts. This conclusion was also emphasized in Wisconsin v. Weinberger, 745 F.2d 412 (7th Cir.1984). This case further defined the role of the court. It was to defer to the agency judgement in reviewing the record and was only to rule if the agency was arbitrary and capricious in reaching its decision. The court was to perform a "balancing of the equities," and even if the NEPA was violated, other factors might or might not favor issuing an injunction against the action, based on those competing interests. In Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87 (1983), the U.S. Supreme Court confirmed and expanded upon the latter point, ruling "Congress in enacting NEPA…did not require agencies to elevate environmental concerns over other appropriate considerations."

The second line of cases describes the significance and weight to be accorded to NEPA and the information necessary for an agency to render a decision. In Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989), the Supreme Court stated that "the NEPA does not mandate particular results, but simply prescribes the necessary process." In Jicarilla Apache Tribe v. Morton, 471 F.2d 1275 (9th Cir.1973), the circuit court held that if the FCC waited until all factors were known in making a determination whether a project would have a significant environmental impact, no construction could *ever* be initiated. The decision must be based on the best information available, but the FCC could reassess the decision at a later time, when more information was known. Mr. Cohen again stressed the importance of maintaining a detailed record for the court's review, reminding the audience that courts did not automatically issue injunctions.

Finally, the decision in Cronin v. Dept. of Agriculture, 919 F.2d 439 (7th Cir.1990) is important because it emphasized that an agency's involvement in the decision-making process was critical. The circuit court ruled that the agency must participate in the administrative review process. The agency was considered to be the subject matter expert, and the generalists performing judicial review of the action had to confine subsequent review to the administrative record and defer to the agency's findings.

Regarding current NEPA litigation, Mr. Cohen discussed the Friends of the Earth (FoE) and Forest Conservation Council (Council) joint petition for the FCC to deny 15 registrations for towers that the FCC had accepted for filing. The FoE and the Council alleged that insufficient analysis of environmental impact occurred. That case turns on whether the parties have standing to sue and are among the class of persons affected by the action that the law is designed to regulate. Parties challenging an action must demonstrate they stand to be injured by the proposed construction. This issue was never reached, however, and the FCC ruled on the merits of the petition that there was sufficient evidence to support the developers' FONSI finding, and the construction was approved.

Summary and Analysis

Mr. Cohen described the history of NEPA, and the EA and EIS process in detail, strongly recommending that applicants keep detailed records from which the FCC can make a clear finding. The PSWN Program should work closely with the FCC to recommend uniform procedures for submission of critical evidence for evaluation, and consult with the FCC and developer to ensure effective communication of compliance issues, as they become apparent. In planning a project, public safety agencies should always conduct an EA and document the investigation, exploration of alternatives, and steps taken to protect the environment. This procedure can save time and money if approval is contested and an EIS becomes necessary.

5. SESSION III—The National Historic Preservation Act, the Section 106 Process, and the Nationwide Collocation Programmatic Agreement

Synopsis

Session III reviewed the National Historic Preservation Act (NHPA) and the regulations and process for evaluating historic properties. The agencies and other parties that participate in the review were also discussed, as well as new rules and court decisions modifying compliance obligations.

Speaker Information

John Clark, Esq., Of Counsel with Perkins Coie, LLP, gave this presentation.

Presentation Overview

Session III examined the NHPA and the National Register of Historic Places (National Register), which was organized under the Act to provide an inventory of historic properties, and to codify the eligibility criteria and procedures for identifying and protecting National Landmarks. The NHPA also established the Advisory Council on Historic Preservation (ACHP), chartered to advise the President and the Congress on policy and programs. The speaker described the roles of other agencies and individuals necessary for the evaluation and preservation of historic sites, and discussed the 2001 Nationwide Collocation Programmatic Agreement (NCPA) as well as other recent changes in the law affecting procedural requirements under the NHPA. He also clarified that the FCC had final authority to approve or reject a proposed communications tower construction project.

In 1966, the Congress enacted the NHPA (16 U.S.C. 470) to reduce or prevent inadvertent destruction, damage, or "degradation to the integrity" of historic places. NHPA Section 101 (a)(1)(B) requires the Secretary of the Interior to promulgate regulations determining eligibility of sites for nomination as National Landmarks, to be included in the National Register (36 CFR 800.4). The National Register protects identified properties from demolition or substantial alteration, and limits development that might inadvertently harm them. Categories of eligible places include religious properties, birthplaces and graves of famous figures, cemeteries, buildings and structures associated with historic figures or events that have been removed from their original sites, unique reconstructed buildings, and other specified criteria. Sites are selected on the basis of their significance in American history, architecture, archaeology, engineering, and culture. About 1,500 eligible sites are nominated annually, but few are approved for the National Register.

The regulations that govern the nomination process for the National Register and the NHPA historic preservation program are administered by local, state, federal, and tribal authorities, and are broadly referred to as "the Section 106 Process." NHPA Section 101(b)(1) authorizes the Secretary of the Interior to regulate and approve State Historical Preservation Programs, and provides for the designation of a State Historic Preservation Officer (SHPO) to administer the program. The SHPO works in cooperation with federal agencies to identify historic properties and enforce the protections of the NHPA. Section 201 (16 U.S.C 470(i)), established the ACHP, the only federal agency created solely to address historic preservation

issues. The ACHP, which derives its authority to promulgate rules from Section 211 of the NHPA, advises the President and the Congress about matters related to historic preservation initiatives. The ACHP also reviews and recommends federal policies and programs, and provides public outreach and education. The ACHP can exempt other agencies, or their programs, from NHPA regulation (§ 214).

The process for approving a site for preservation as a National Landmark is complicated, and subject to many levels of scrutiny. The owner of a property must be notified if that property is declared eligible for inclusion on the National Register as a National Landmark (Section 101 (c)(2)(A)). If the owner objects, the property cannot be listed. Even if the owner objects, this information on an eligible property is made available to state and local agencies and the ACHP so any plans made for projects that could potentially effect that property consider its historic significance, and the property is treated as if it were included. Notice is provided to SHPOs and other federal agencies, and public notice is published in the Federal Register, listing those properties that meet eligibility criteria. In 1979, the Secretary of the Interior expanded the protection of NEPA to include properties that are *eligible* for inclusion in the National Register. The SHPO is authorized under NEPA to identify historic properties for inclusion in the National Register; other local, state, and federal government officials, and even private parties can also nominate historically significant sites for that purpose. In addition, if the property has "traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization" it may qualify as a National Landmark to be included in the National Register, and agency consultation is required with the appropriate tribe, or Native Hawaiian organization participating in the evaluation process (Section 101(b)(6)(A)).

Tribal entities may elect to share or assume the SHPO's powers in situations involving tribal lands. The tribe's chief governing authority has the prerogative to perform some or all of the duties of the SHPO in these situations. The tribe may appoint a Tribal Historic Preservation Officer (THPO) to administer the tribal preservation program, subject to notice provisions and approval by the Secretary of the Interior (Section 101(d)(2)). The SHPO continues to serve as the authority regarding any functions not assumed by the tribe or regarding procedures pertaining to properties not owned or controlled by the tribe.

The Section 106 process also recognizes the duty for consultation with an affected Indian tribe or Native Hawaiian organization. If the land to be developed is owned or under the control of a federal agency (Section 110(a) (2) (D)), the prospective action will occur on tribal lands and may extend to adjacent properties, as well. The tribe, agencies, and any other parties participating in the consultation process evaluate the effects of the plan, identify alternatives, and make recommendations on how to minimize the effects of the proposed undertaking. If the tribe quits the negotiations and later resumes its participation in the consultation process, it must be included in future decisions; however, decisions made in the absence of the tribal representatives are binding and are not required to be reconsidered. The speaker recommended that applicant agencies and private parties that plan to develop a site should identify and initiate consultation with the SHPO and/or the THPO and engage them in a dialog early in the process. The applicant is authorized to initiate the consultation process with the tribe. The tribe may also assert its rights to consult directly with the FCC.

The NHPA requires that every federal agency must develop and maintain an historic preservation program for those properties under the agency's jurisdiction or control (Section 110(a)(1)). First, it must be determined whether a proposed project can be classified as an "undertaking" under the rules. Under the ACHP's regulations, the agency official (AO) reviews the activity to determine whether it is an undertaking (36 CFR 800.3 (a)). The NHPA applies to all undertakings that have the potential to cause effects on historic properties. An "effect" must alter the characteristics that qualify a property for eligibility for inclusion on the National Register. If the action is an undertaking performed by the agency; or an undertaking by another party, but subject to a license, permit, or approval from the agency; it is reviewed for determination of effect. If the undertaking is found to have no potential to cause effects on historic properties, no further action under Section 106 is required (36 CFR 800.3 (a)(1)). If the undertaking will have an effect, or could possibly have such an effect, the applicant must provide documentation of the finding. Section 110 (f) requires that those agencies conducting an evaluation must minimize harm that may be caused to any project site that is already designated or eligible to be a National Landmark, *"to the maximum extent possible"* (emphasis added). In such cases, the AO must provide the public with the information about an undertaking and its effects on historic properties, and seek public comment and input.

If the agency determines the property would be affected, it must be decided whether the effect is adverse. If the agency rules there is no adverse effect, any participating tribe must still be consulted. There is a second 30-day period for the SHPO, THPO, or tribe to concur with the ruling. If they disagree, they must specify their reasons, and request that the ACHP conduct a review. The speaker explained that the ACHP is then given 15 days for a "reasonable opportunity for comment" regarding the impact of a proposed federal or federally assisted undertaking on a property eligible for inclusion in the National Register. Mr. Clark cautioned that if the SHPO or the THPO did not comment on an applicant's findings within 30 days, the applicant was advised to contact the FCC and request approval prior to proceeding with their intended project. While not law, this advisory procedure was recently recommended by the ACHP in a letter dated September 21, 2001. The ACHP also recommends several criteria for keeping the FCC actively involved in the consultation process, especially where there is contention among the parties and disagreement regarding the effects of a proposed undertaking. The ACHP's regulations also describe how the Section 106 process should be coordinated with NEPA and other environmental and historical protection statutes. These statutes specifically include the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and with agency-specific legislation, such as section 4(f) of the Department of Transportation Act (36 CFR 800.3 (b)).

Other important provisions of the Act include Section 107, which contains exemptions from the NHPA for the White House, the U.S. Supreme Court, and U.S. Capitol. Section 108 establishes the Historic Preservation Fund, and Section 109 authorizes the Secretary of the Interior to accept donations for the preservation of historic sites. Section 305 is also significant, providing that *"any interested person"* may enforce provisions of NEPA in a federal court. If that party substantially prevails on the merits, he or she is entitled to be reimbursed for all court costs and reasonable attorneys' fees.

On January 1, 2001, new rules incorporated in Section 106 of the NHPA went into effect. In late 2001, a tower siting/wireless communications case that tested the new rules, the NMA v. Slater decision, was reached. It held that the AHCP has full authority to adopt binding procedural rules that the FCC and other federal agencies must follow. However, the court held that the newly promulgated substantive rules were invalid. The court found that the FCC was the sole agency empowered to grant approval for tower construction, and the ACHP could not reverse an FCC finding of no effect or no adverse effect on the environment. The Slater decision changes the requirements under Section 106. Now, if an adverse effect is found, the federal agency (in the case of tower construction, the FCC) must be brought in. The ACHP must also be notified. Finally, a finding of an adverse effect activates Section 110 (36 CFR 800.5(d)(2)), requiring a Memorandum of Agreement (MOA) or a letter agreement with the SHPO to resolve the adverse effects before the developer can proceed with construction. The public must also be notified of the adverse effect of the undertaking. If an agreement cannot be reached, it is up to the FCC to permit the undertaking or deny approval.

Another statute that can affect public safety tower construction projects is the NCPA (16 U.S.C. 470), which may streamline the approval process for proposed actions when "piggybacking" on an existing structure. The Act regulates antenna collocation, defined as "the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes." A tower is defined as "any structure built for the sole or primary purpose of supporting FCC licensed antennas or their associated facilities." Signed on March 16, 2001, it is an agreement among the FCC, the ACHP, and the National Conference of State Historic Preservation Officers (NCSHPO) and binding on SHPOs. Rules apply differently to towers built prior to the date of the agreement, and those built after. While the Agreement was not signed by the tribal nations, it was intended to be binding on them, at least regarding undertakings not taking place on tribal lands. The speaker advised that, under the terms of the Agreement, most collocations would not require consultation.

Most recently, the FCC Fact Sheet (released January 10, 2002), while not a binding rule, is offered as "authoritative agency guidance" for telecommunications interests. It clarifies several issues: towers are now "clearly covered" under the NCPA, and unless an exception applies, "collocations shall not be submitted to the SHPO for review." Defunct wireless towers may be brought back into service for new collocators through a streamlined review and approval process. The Fact Sheet also clarifies when a "pending environmental review" for broadcast facilities commences. The speaker also discussed the requirement under the NHPA to consider alternatives in planning a project. He stated this provision applied more to projects planned by the Government—private parties were presumed to have selected the best location for an action.

Mr. Clark recommended that clarification is necessary regarding how long review and consultation can last, and who has the decision-making power at different stages in the process. It was suggested that the FCC should also specify how the public's views were to be ascertained and give consultation guidelines for the acting or regulating federal agency, the ACHP, SHPO, and THPO. Mr. Clark also recommended providing precise definitions for key terms, including "Effect," "Adverse Effect," and "Area of Potential Effect."

Summary and Analysis

Session III explored key provisions of NHPA and new rules affecting the identification, evaluation, and consultation processes. All necessary local, state, federal, and tribal parties must take part in order to meet the prerequisites for approving construction projects, and other laws that may apply in considering an undertaking must also be examined. However, the power to approve a tower construction project resides with the FCC alone. Public safety developers should be sensitive to the tribe's concerns about disrupting culturally significant sites and should emphasize their commonality of interests and request cooperation in preserving and protecting lives and property for the tribes.

6. KEYNOTE ADDRESS I—The Role of the Council on Environmental Quality in the Regulation of Communication Tower Sites

Synopsis

The first keynote speaker commented on the Council on Environmental Quality's (CEQ) role in the Bush Administration, regulatory philosophy, and efforts to work in cooperation with the industries it regulates to simplify compliance procedures and improve communications with applicants. The speaker also discussed new rules and recommendations to deal with issues under investigation and to facilitate a better understanding of the law.

Presenter Information

Dinah Bear, Esq., is General Counsel for the Executive Office of the President's Council on Environmental Quality. She has spent more than 20 years with the agency, which advises the President on environmental matters, develops policy, and coordinates implementation of policy among federal agencies. She has also chaired the American Bar Association's Standing Committee on Environmental Law and the DC Bar's Steering Committee of the Environment, Energy, and Natural Resources.

Presentation Overview

Ms. Bear described the CEQ, an independent agency in the Executive Office of the President, which was created by the Congress as part of NEPA. She discussed the role of the agency with respect to recommending and regulating environmental policy and stated that the regulations promulgated by the CEQ to implement NEPA were due for revision. The speaker also mentioned the Migratory Bird Treaty Act (MBTA) and the status of scientific study of bird behavior in relation to communications towers and regulations.

The speaker began her address by describing how the CEQ was created, its role in environmental regulation, and its objectives. The Congress intended NEPA to be its authoritative and overarching plan to create a national environmental policy. Ms. Bear referred to NEPA as the "environmental Magna Carta," which created and defined responsibilities for the present generation as trustees of the environment for future generations. The Congress intended for the authority of federal agencies to be supplemented by the requirements of NEPA. Provisions of NEPA also established the CEQ, which received additional responsibilities under the Environmental Quality Improvement Act of 1970. The CEQ first promulgated regulations for administration of NEPA in 1979. The objectives of the CEQ are to advise the President on environmental policy, implementation of environmental policy and coordination between federal agencies, and provide primary administration of NEPA.

Ms. Bear then turned her attention to the role of the CEQ within the Bush Administration. She credited CEQ Chairman James Connaughton for his knowledge of environmental issues and "smart compliance" techniques. Ms. Bear stated that five principles should be used to judge the performance of the CEQ: the agency's stewardship of resources; innovation; the complementary role of local, state, and tribal governments working with the CEQ; the agency's science and decision-making policy; and its record of compliance. To keep current with contemporary issues

and emerging technologies, the NEPA regulations have been updated on occasion since 1986, and while the results were satisfactory at that time, the regulations are due for a comprehensive review. The speaker stated that as circumstances changed and the FCC adopted a different focus, the regulations should be updated to reflect those changes. Other factors, including the character of the contemporary regulatory scheme, case law since 1986, and changes within the Executive branch, emphasized the need for revision of the regulations, especially regarding the impact of subjective values such as aesthetic damage to the environment.

Ms. Bear also discussed progress regarding the MBTA and scientific studies performed regarding the effects of wireless towers on birds' behavior. She stated that there had been little progress so far and that the reason for birds' attraction to the towers is unclear. She said that the U.S. Fish & Wildlife Service (USFWS) had prepared interim guidelines, and advised developers to consult these guidelines in advance. Both the USFWS and the CEQ consider the guidelines voluntary. Ms. Bear suggested that additional comprehensive study should be performed and was hopeful that a technological solution that would address this issue constructively could, one day, be presented. She also encouraged a public–private partnership to develop and implement a solution.

Summary and Analysis

The speaker was able to clarify the CEQ's role in working with the local, state, and tribal authorities, as well as with other federal agencies, to coordinate compliance efforts and provide the President with a complete picture of environmental initiatives and issues to be addressed. She also stated that regulations were due for review and modification soon. The PSWN Program should look to this office for advice and assist states, tribal nations, and other public safety programs in achieving compliance with CEQ regulations. The program should also initiate and facilitate contact between the agency and developers planning construction projects on behalf of public safety communications users.

7. KEYNOTE ADDRESS II—The Role of the Federal Communications Commission in the Regulation of Communication Tower Site

Synopsis

This presentation focused on the FCC's role in enforcing environmental statutes and the effect of these regulations on the construction of communications towers.

Presenter Information

Jeffrey Steinberg, Esq., is Deputy Chief of the Commercial Wireless Division of the FCC's Wireless Telecommunications Bureau. He has also served as Special Counsel for the Commercial Wireless Division, and was the senior attorney with both the Wireless Telecommunication Bureau's Policy Division and the Cable Services Bureau. Actively involved in facility siting issues and the NEPA, Mr. Steinberg was central in the preparation and negotiation of the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas.

Presentation Overview

The speaker stated that his goal was to discuss the NEPA from the FCC's point of view. He addressed changes in the industry over the last few years, calling for a reexamination of the regulations implementing NEPA and encouraging a public–private cooperation to better define, observe, and enforce the Act.

Mr. Steinberg addressed the FCC's policy implementation and administration of the NEPA. He said that the FCC was concerned with ensuring that no violations of environmental policy occur because of the construction of communications towers. The FCC was also interested in streamlining the process to simplify procedural issues in order to eliminate duplicating the work and to prevent substitution of the FCC's judgment for that of the environmental decision makers. Mr. Steinberg summarized key changes in the communications tower industry since 1986. He cited developments within the industry, including the widespread build-out of competitive systems and exponentially greater use of wireless communications services, as changing the face of the industry. Mr. Steinberg offered that "the tower management industry has grown up," and concluded that the current rules and practices that apply to the field "are not ideally suited to the present environment."

Mr. Steinberg stated that there were several alternatives for updating NEPA regulations. He suggested that a drastic reorganization and redrafting of current regulations might not be necessary and implied minor rule changes, and clarifications within the rules and regulations, might be adequate to give companies better guidance. He referred to Mr. Clark's comments as the kind of constructive criticism needed to clarify and improve interpretation and administration of the law. He also suggested that letters or formal agreements might resolve issues pertaining to the administration of the law. The speaker also mentioned that the FCC might examine the policy of the Army Corps of Engineers in issuing blanket permits to developers for communication tower projects, and that the FCC favored exempting certain towers from the process, i.e., if those towers have no lights, are under 200 feet, and self supporting. Finally, he stated that if these

measures were insufficient, then a comprehensive rewrite would occur. He said the time frame for the proposed reexamination of the regulations was uncertain.

Mr. Steinberg thanked Ms. Bear for attending the seminar, and stated that he looked forward to engaging in a dialog with the CEQ to work together and improve administration and enforcement of NEPA. He also stated that the FCC hoped that other stakeholders involved with the requirements of NEPA would participate, and that the industry and other agencies would all contribute to further proceedings. He reminded the attendees of the heavy costs of fines and other actions that the FCC would take for non-compliance.

The speaker stated that the FCC was getting assistance in understanding and administering NEPA's substantive and procedural requirements from legal experts and FCC staff. He suggested that if compliance recommendations from different regulatory authorities involved in the process conflict, the applicant should contact the FCC to sort out the priorities for compliance and resolve any differences with other agencies. Regarding the scientific investigation of migratory bird behavior, Mr. Steinberg stated that he was hopeful that the affected industries would provide financial support and study the issues voluntarily. He mentioned studies in Chicago and New York in which lights were being turned off on structures to determine if that would have an effect on the birds' behavior. He said lights, tower height, and guy wires were among the variables that were being examined, and stated that the FCC did not have the staff or resources to do this alone. He invited attendees to assist the FCC in improving the process, reminding them that "we're all in this together."

Summary and Analysis

Mr. Steinberg discussed changes within the wireless industry and current initiatives at the FCC to respond to these changes by modifying regulations to streamline NEPA compliance procedures. He asked for greater participation and input from all relevant stakeholders. The PSWN Program should recommend uniform compliance procedures to the FCC. The program should also provide the FCC with a definitive list of documentation that applicants must present that is sufficient to verify compliance with NEPA requirements.

8. SESSION IV—Federal Wildlife Protection Laws, the Endangered Species Act, Avian Protection Laws, and Dealing With the U.S. Fish and Wildlife Service

Synopsis

Session IV highlighted the application of various federal wildlife management laws to the construction of communications towers. The important provisions of the Endangered Species Act (ESA) and other statutes, as well as court cases interpreting them, were examined.

Presenter Information

Patrick Ryan, Esq., is an attorney in the Seattle office of Perkins Coie, LLP, where he integrates environmental and natural resources law, Indian law, and land use law to advise clients. He specializes in Environmental Protection Agency (EPA) compliance counseling. Mr. Ryan has experience in both civil and criminal defense as a litigation attorney in ESA cases, as well as under the MBTA, the Bald and Golden Eagle Protection Act (BGEPA), the Clean Water Act, the Resource Conservation & Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Safe Drinking Water Act.

Presentation Overview

Session IV centered on some of the important statutes enacted for the protection of endangered and threatened species, birds, and other wildlife. Mr. Ryan reviewed the ESA, (16 U.S.C 1531 (1973)), the MBTA, and the BGEPA. He examined the types of environmental effects that require an agency to prepare an EA and discussed the consultation process required between federal agencies under Section 7. The meaning and significance of "adverse environmental effect" and "take" under these statutes was examined along with the process for receiving USFWS approval for a construction project despite unintended or incidental effects.

Mr. Ryan first offered an historical perspective on wildlife protection law, going back to English common law restrictions on hunting on the King's lands. He stated that wildlife protection law began to be codified at the beginning of the 19th century. The MBTA (16 U.S.C 701) dates back to criminal statutes from the early 20th century, and the BGEPA (16 U.S.C. 668) was passed to protect our national symbol, which was already rapidly disappearing more than 60 years ago. The speaker noted the interaction and overlap among the agencies that the FCC works with in enforcing the ESA and other statutes protecting wildlife. These agencies include the USFWS, EPA, the Department of the Interior (DOI), the U.S. Forestry Service, the Federal Aviation Administration (FAA), the National Marine Fisheries Service, and local, state, and tribal authorities.

The speaker then reviewed the ESA evaluation process, which also considers the effect that a proposed action will have on the environment, specifically examining whether the action will harm endangered and threatened species and habitats. The substantive provisions of the ESA are Sections 7 and 9, giving federal agencies the authority to carry out programs for the protection of endangered or threatened species. ESA Section 7 lists nine categories of environmental effects that require preparation of an EA. These include construction of—

"(1) facilities that are to be located in an officially designated wilderness area,
(2) facilities that are to be located in an officially designated wildlife preserve,
(3) facilities that: (i) may affect listed threatened or endangered species or designated critical habitats; or (ii) are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of the Interior pursuant to the Endangered Species Act of 1973,
(4) Facilities that may affect districts, sites, buildings, structures or objects eligible for listing in the National Register,
(5) Facilities that may affect Indian religious sites,
(6) Facilities to be located in a flood plain,
(7) Facilities whose construction will involve significant change in surface features (e.g., wetland fill, deforestation or water diversion),
(8)(a) Antenna towers and/or supporting structures that are to be equipped with high intensity white lights which are to be located in residential neighborhoods, as defined by the applicable zoning law," (47 CFR 1.1307(a) (3))

"(b) In addition to the actions listed in paragraph (a) of this section, Commission actions granting construction permits, licenses to transmit or renewals thereof, equipment authorizations or modifications in existing facilities, require the preparation of an Environmental Assessment (EA) if the particular facility, operation or transmitter would cause human exposure to levels of radiofrequency radiation in excess of the limits in Secs. 1.1310 and 2.1093 of this chapter." (47 CFR 1.1307(b))

An applicant planning a communications tower must submit an EA to the FCC for review of the proposed action. For any action within one of the categories listed above, the FCC must also fulfill its ESA consultation obligations with other regulatory agencies required to participate in the review process. This includes the DOI, the ACHP, and the SHPO, "in accordance with their established procedures." (47 CFR 1.1308 (b) (Note))

ESA Section 7 consultation and review may be formal and on the record, but is more often done on an informal basis, if the agency action is not likely to affect endangered or threatened species, modify critical habitats, etc. Mr. Ryan recommended that an applicant should memorialize any evaluation and assessment that occurs in writing to establish a record. Particularly in the case a "no adverse effect" finding, an applicant should perform a biological assessment at that time to support the finding and forward it to the USFWS. The agency must provide comments within 30 days in writing, and those comments should become part of the company's record to demonstrate good faith compliance. If the contemplated action could affect a species or habitat, the applicant *must* perform a biological assessment; if no adverse effect is anticipated, a concurrence statement must be issued within 30 days under the regulations. Mr. Ryan said it was more realistic to expect the concurrence in 3 to 6 months. If the USFWS contests the finding of no adverse effect, or does not concur with the result, the agency must take part in formal consultation under Section 7 (50 CFR 402.14 (c)). In formal consultation, the USFWS considers two factors. The first is whether the proposed action would jeopardize a species or habitat. The second factor is whether the proposed action could cause "incidental take" of a listed species.

"Take," another key concept in the ESA, includes conduct that results in "killing, harming, or harassing" a listed species. Under Section 9 of the ESA, unless authorized, persons causing the damage are subject to administrative, civil, or criminal liability, even when the damage is unintentional, i.e., *incidental* take. Mr. Ryan noted that incidental take could occur even after the project was completed. Section 10 of the ESA allows incidental take permits with Habitat Conservation Plans (HCP) for state, local, or private activities. HCPs are land use plans that allow nonfederal users incidental take permits in exchange for a "conservation commitment." The proposed action may not reduce the chance of survival and recovery for an endangered or threatened species, and the developer must mitigate any adverse impact "to the maximum extent practicable." Each HCP is different and is subject to approval by the Secretary of the Interior.

Under the MBTA, the definition of "take" differs from that found in the ESA, defining take as an *intentional* act, which includes pursuit and attempt to hunt, shoot, wound, kill, trap capture, collect, etc. Courts have generally agreed that the MBTA only regulates the kind of physical conduct listed as pertaining to a listed migratory bird; however, the MBTA is a strict liability statute, which is enforced by federal criminal prosecution or delegated to the states. A different definition of "take" applies to bald and golden eagles under the BGEPA, which does *not* create strict liability for violators. The BGEPA also specifically prohibits "poisoning, molesting, or disturbing" the birds, and is subject to enforcement by both the USFWS and the DOJ. However, any one or all of these statutes may come into play when developers plan tower construction projects that can affect various native wildlife.

Mr. Ryan reviewed several court cases that interpreted the MBTA. First, he stated that the Court of Appeals for the District of Columbia broke ranks with other circuits in Humane Society v. Glickman (1999) by holding that the Administrative Procedure Act is available to enjoin federal agencies from violating the MBTA. Mr. Ryan stated that some courts have used tort theories to enforce the Act and considered certain activities, such as application of pesticides and disposal of waste water, as "inherently dangerous," requiring a higher standard of care by the applicant to protect birds from harm. In Moon Lake (1999), the defendant electrical utility company pled guilty to criminal liability provisions of the Act, which applied to even indirect, unintended, and incidental uses of land, causing the death of migratory birds. In addition to a fine and probation, the company was ordered to retrofit its equipment to prevent further damage.

Mr. Ryan examined other court decisions, to demonstrate the difference in the outcome of consultation procedures. In Minnesota Public Radio (1996), the Commission licensed a tower against USFWS objections, where it found that the effect of the undertaking would not have an adverse effect on bald eagles. In County of Leelanau, Michigan (1994), and Weigel Broadcasting Co. (1996), both orders noted that the applicants had gone through Section 7 and the formal consultation process. The USFWS issued letters of concurrence for each project. Finally, in the Caloosa (1988) case, the applicant went through the entire process—holding formal consultation, undergoing a formal biological opinion, and receiving agency permission to proceed with the project. Again, the applicants were encouraged to communicate with the USFWS and to be receptive to recommendations to mitigate adverse effects.

Mr. Ryan made several recommendations, including further scientific study to examine the effects of communications towers on the behavior of migratory birds. He advised tower construction companies to participate in the Memorandum of Understanding (MOU) process with USFWS to obtain better guidance regarding their responsibilities under the MBTA and the BGEPA. He also suggested the FCC should revise the NEPA regulations for migratory birds to include programmatic Section 7 consultation requirements for tower siting and construction regulation. He recommended that the FCC should issue blanket incidental take permits for species not listed by the ESA as endangered or threatened.

Summary and Analysis

The speaker discussed the ESA and MBTA at length, each of which may impact any communications tower project. These laws also interact with NEPA and the NHPA, and must be considered in the process of planning, whether the developer is a government, commercial, or private party. The laws are subject to strict enforcement, and in some cases, criminal penalties, when violated. Not only will the violators have to contend with courts, fines, and possible incarceration, but negative publicity that may be fatal to their success in being approved or licensed. Public safety agencies planning construction in an area where threatened and endangered species and critical habitats may be affected should take all necessary actions to mitigate environmental impact, and request HCPs to qualify for incidental take permits, in case damage cannot be avoided. The PSWN Program should also encourage public safety agencies to build strong ties and to deal amicably in their contacts with regulatory agency personnel, especially the FCC, as the authority that will make decisions regarding communications issues.

9. SESSION V—Tribal Consultation Requirements Under Section 106 and the Federal Policy of Government-to-Government Tribal Relations

Synopsis

Session V centered on the process of negotiation between applicants, regulating agencies, and tribal nations having an interest in the land affected by the construction of communications towers.

Speaker Information

Daniel Abeyta, Esq., is Team Leader with the Commercial Wireless Division, Wireless Telecommunications Bureau of the FCC. Mr. Abeyta's responsibilities include overseeing compliance with the NEPA. He has also worked to eliminate case backlogs for 200 MHz, 800 MHz, and other litigation. He has also worked in the Commission's Common Carrier Bureau in streamlining tariff-filing provisions. Mr. Abeyta was joined by Mr. Clark and Mr. Martin, both attorneys with Perkins-Coie, LLP.

Presentation Overview

Session V discussed the tribal consultation process under Section 106 of the NHPA. The speakers discussed the circumstances in which tribal consultation was required and the need for the affected tribes to participate in the review and consultation processes. The speakers encouraged applicants to consult directly with the tribes as designees of the FCC. The speakers explored the role of the other agencies involved in the approval and contracting processes. The speakers clarified the sources of tribe sovereign powers and emphasized that the negotiations between agencies and tribes are accorded government-to-government status.

Mr. Clark began the session by explaining that tribal consultation often dealt with important historical issues and could become emotionally charged. The process is not always rational, or cut and dried. He stated that Indian tribes and Native Hawaiians were considered "dependent sovereign communities" and that agencies and other applicants needed to treat them with respect and follow the law. Mr. Clark warned that the tribal nations would fight proposed actions if appropriate protocol was not observed.

The speaker recalled the factors of Section 106 of the NHPA that trigger tribal consultation procedures discussed earlier in the day. He reiterated that a Federal agency shall consult with any Indian tribe or native Hawaiian organization that attaches religious and cultural significance to properties of traditional and cultural importance to an Indian tribe or native Hawaiian organization (Section 101(d)(6)(B)). The ACHP interprets this requirement as including only those properties identified as eligible for inclusion in the National Register, and, thus, the fact that an Indian tribe or native Hawaiian organization finds a property is significant to them is not sufficient, by itself, to require Section 106 consultation.

Prospective developers planning tower construction must demonstrate "a reasonable and good faith effort" to identify Indian tribes that attach religious and cultural significance to properties that are affected by an undertaking. Developers were advised to contact the Bureau of

Indian Affairs (BIA) to learn the identity of a tribe's leaders. They should recognize that neither contacting BIA, nor sending a form letter to a tribe is enough to qualify as consultation and that follow-up efforts are required if no answer is immediately forthcoming. Mr. Clark stated that reliance upon the SHPO to help identify the tribes that had a claim on the relevant lands was reasonable. He was contradicted by Mr. Abeyta, who argued that a more thorough investigation was required. Mr. Clark and Mr. Abeyta agreed that the SHPOs findings and recommendations should be made part of the written record for the purpose of establishing the company's diligence in engaging the necessary parties.

Mr. Clark also discussed what activities were included in providing an identified tribe with a "reasonable opportunity for comment." Meaningful participation included allowing the tribe to identify its concerns about historic properties, advise the developer on the identification and evaluation of historic properties, describe the effects of the proposed undertaking on the site, and to be involved in the resolution of any adverse effects. He also instructed that confidentiality of information was important because tribes "may be reluctant to divulge the significance of a site" with specificity regarding the location, nature, and activities associated with that area.

Mr. Clark advised attendees to keep in mind that negotiations with the tribes were "government–to–government relationships," and that formalities must be properly observed. He said that the ACHP issued a letter on September 21, 2001, that stated the FCC could appoint designees to consult directly with the Indian tribes; however, the tribes could assert their rights to consult directly with the FCC. Finally, Mr. Clark discussed the payment of fees for tribes to consult with agency, including travel and other expenses incurred. The ACHP "encourages Federal agencies to take the steps necessary to facilitate tribal participation," by using agency resources to help pay the costs associated with the identification of tribes, historical properties, etc. This policy is not mandatory, but the ACHP strongly endorses such financial contribution by developers, as well.

Mr. Martin provided advice on the business etiquette that firms should observe when working with Indian tribes. He stated that it was necessary for the companies doing business with Indian tribes to contract *directly* with those tribes, because the tribes might have rules completely separate from federal requirements that must also be observed. He reminded the attendees that the NEPA regulations only applied to federally recognized tribes and that consulting "members of a tribe (or several tribes) functioning in a business capacity" was not the same as consultation with the tribe that was required by the law. Only those tribes recognized by the Federal Government are treated as sovereign nations. In order to be eligible for federal recognition, a tribe "must have continuously existed over a period of time, followed a leadership authority, and functioned as a group consistently in an ongoing manner." It was recommended that contact with unrecognized tribes, while not required, may also be advisable to get information on the culture, traditions, and other interests of that area that may be considered important by the affected groups.

The speaker said the sovereignty of Indian tribes was equivalent with national status. Tribal sovereignty is not derived from the U.S. Government, or subject to state or local control, but is recognized by the United States, which views the tribes as "domestic dependent nations." Federally recognized tribes have immunity from suit, exclusive jurisdictions, treaty rights, and

other unique legal powers and prerogatives. Other rights and powers may be derived from treaties, which also vary with each tribal nation. The United States can sue a tribe, and the Congress or the tribe can waive tribal immunity. Otherwise, the tribe can only be sued in a tribal court, under a "limited waiver of sovereign immunity." Mr. Martin also suggested strongly that if possible, developers should not sue in a tribal court, stating that the rules were much different.

Mr. Martin recommended that establishing a positive, productive, and honest discourse with tribal representatives could help move a proposed project forward. He also advised developers to ascertain the limits of tribal jurisdiction and how that related to the goals of the undertaking. An applicant must be certain that it is dealing with the proper tribal entity, i.e., the entity with authority to negotiate and bind by contract. Applicants should consider mediation and arbitration as possible dispute resolution methods in the contract or agreement, and jurisdiction should be made clear in the event of a dispute. Under 25 U.S.C. 81, any contract or agreement (including leases) with a tribe that is longer than 7 years must be approved by the BIA to ensure fairness of its terms. (This requirement is also implied under 25 U.S.C. § 415). Agreements with tribes cannot exceed 25 years. NEPA and other federal laws also apply to approving the contract or agreement, which must address how the terms of the document can be enforced and must include a valid tribal waiver of sovereign immunity.

Mr. Abeyta acknowledged that the tribal consultation process under NHPA Section 106 was premised on both federal constitutional and statutory law. He reminded the group that the Federal Government had a fiduciary duty to the tribal nations. Mr. Abeyta said that the FCC also understood that obligation, and its policy required consultation with tribes before an undertaking could begin, whenever tribal lands and interests are involved. He stated that tribal nations generally believed that telecommunications companies were insensitive to tribal nations' sovereignty and the need for confidentiality. If a tribe asserted its right to consult directly with the FCC, Mr. Abeyta suggested the company might be able to form a better relationship at a later time and resume responsibilities for the consultation after the tribe had a chance to consider the proposed action.

Mr. Abeyta stated that the FCC would often initiate consultation with tribes, but applicants could do so as well. The FCC encourages companies to investigate and be aware of all tribal interests, whether or not they were formally articulated, that might apply to a construction project. To this end, Mr. Abeyta told attendees not to rely on the judgment of SHPOs and mentioned a case in which a tower was constructed and another tribe, not consulted or identified, had a claim to a site. The artifacts that were present were affected adversely by the undertaking, and the tower was ordered removed by the FCC. Mr. Abeyta informed the attendees that the FCC was in the process of putting together a database to index tribal authorities and interests in various regions to prevent like occurrences in the future.

Several practical recommendations were made for negotiating with tribes. Applicants were advised to acknowledge the delegation of duty from the FCC to conduct consultation with the tribes. Mr. Abeyta suggested that an applicant should be prepared to make a commitment to a long-term relationship with the tribe, observing that tribes were very astute and had political influence as well. He further recommended that if applicants were told that the tribes did not want a project to go forward, the applicants should address the tribe's concerns to see whether

there was room for compromise. Mr. Abeyta also cautioned that if problems arose in the course of the consultation process, the applicants were advised to contact the FCC immediately.

Summary and Analysis

The discussions were helpful in advising attendees about issues and considerations to be examined in conducting consultation with tribes. The Federal Government has a fiduciary duty to ensure that negotiations are fair, and the tribe can make an informed decision. Therefore, all agreements will be reviewed by those agencies participating in the consultation process. Tower construction projects should anticipate a tribe's concerns and try to provide incentives, such as jobs, education, and other benefits, especially if the project will have an adverse effect. Public safety agencies might have an advantage over other developers if they can demonstrate their commitment to protecting the tribe and its interests (i.e., law enforcement and the protection of life and property), be responsive to the tribe's concerns, and support the preservation of tribal culture.

10. SESSION VI—Panel Discussion

Synopsis

Session VI concluded the seminar with a discussion of relevant laws, particularly the NEPA and the NHPA, and a question and answer period in which attendees addressed questions to members of the panel. The panel expanded on policies initiated to improve and streamline the application and review process.

Speaker Information

The panel consisted of Moderators Karen King, Director, Government Relations, PCIA; Roger Sherman, Esq., Senior Attorney for Regulatory Affairs, Sprint PCS; and John Clark, Esq., Of Counsel, Perkins Coie, LLP. Other speakers included FCC Wireless Telecommunication Bureau Attorneys Jeffrey Steinberg, Esq., Daniel Abeyta, Esq., Frank Stillwell, Esq., of the Commercial Wireless Division, and Nina Shafran, Deputy Chief of the FCC Mass Media Bureau, Audio Services Division.

Presentation Overview

In Session VI, the panelists spoke to the audience, encouraging their participation in the regulatory process, and inviting constructive interaction with the FCC. The FCC's plans to streamline and clarify regulations, and expedite rulings, were described by speakers from the attending FCC bureaus. The MBTA, consultation with multiple tribes, the interaction of regulatory agencies in the Section 106 process, and deadlines imposed under the NHPA, were among the subjects of questions addressed by the panel.

Several FCC counsel addressed the seminar, discussing current initiatives to improve and expedite the licensing process. The proposed changes include modification of rules and a conscious effort to limit administrative review to 6 months or less. Mr. Abeyta stated that the objective of the Wireless Bureau staff was for all NEPA matters to be resolved within 6 months. He stated that the FCC had gone from reviewing approximately 60 NEPA cases per year to reviewing more than 300. He estimated that the FCC had dealt with more than 500 NEPA cases in the last year, and that the current backlog of approximately 50 cases that were already more than a year old was still being reviewed. Mr. Abeyta said these efforts were consistent with the directives of CEQ rules and policy, which gave a 3-month timetable for cases to be resolved. The proposed FCC policy would create a 6-month schedule from the time a case was entered into the FCC's database. At 6 months, the applicant would be given 15 days to furnish the FCC with a timetable and a schedule for the proposed resolution of the case, and then given 30 days to complete it. The speaker said the FCC was looking for "a demonstration of good faith effort" from the applicant. Applicants would retain the right to judicial review and other procedural protections.

Mr. Stillwell said that the number one complaint made by applicants was the time it took for a FCC decision on tower construction because of the NEPA and other factors. He recommended that applicants should do their part to speed up the process, citing several concrete steps that could be taken. First, he suggested attorneys should do adequate planning, perform environmental reviews, and meet with the appropriate USFWS representatives and SHPOs. He

said they should open up the lines of communication by explaining the interests they represented, and what they wanted to do. Mr. Stillwell also stated that when undergoing review by the SHPO, applicants should request a conditional adverse effect ruling prior to a final letter being sent to the FCC. In that way, the applicant had a warning of problems and might be able to take measures to mitigate the damage. If the damage could be minimized beforehand, this would also limit FCC involvement.

Mr. Stillwell also stated that if there was ultimately an adverse effect ruling, the applicant should be realistic and explore the alternatives. If there was no choice regarding relocation, the applicant should evaluate what could be done to mitigate the effect. He counseled that the company should be proactive and not wait for the FCC to receive the adverse effect letter. He also stated that the company should make two copies of the required evaluation materials under 47 CFR 800.11 (e) and submit them to the ACHP. He also stated that he favored streamlining and expediting the approval process for public safety communication tower construction.

Ms. Shafran said that the Mass Media Bureau (MMB) was responsible for the regulation of all television and radio broadcasts, and was divided into audio and video service divisions. These entities were regulated through the application process, both for new stations, and for modification of existing stations. She reiterated that the FCC relied on self-certification for applicants to demonstrate compliance with environmental regulations, warning that applicants were subject to criminal prosecution for avoiding environmental laws. Some "egregious" NEPA cases would be referred to the Enforcement Bureau—it was unfair for some companies to ignore regulations while others paid the costs and took the time to show good faith consideration of the necessary factors.

Ms. Shafran indicated that Web pages on the FCC site were devoted to new tower siting issues, and that FCC personnel were exclusively assigned to this task. She said that the FCC staff did not have much expertise in environmental compliance because there had been little litigation in this area to date (fewer than 300 cases). She advised applicants that until further notice, the current forms were still valid, and that the applicants could verify the accuracy of their information in advance to prevent further delays in processing.

Questions Addressed

Several members of the audience asked the panel a number of questions. Among them was the significance of the 30-day rule and going forward with a proposed project after a deadline for review under the NHPA had expired without comment from the SHPO or THPO. Mr. Steinberg replied that the developer was strongly recommended to contact the FCC regarding the expiration of the deadline before proceeding. He also stated that if a SHPO was unreasonable, acting irresponsibly, withholding approval without justification, or making an arbitrary assessment, the FCC would decide what to do on a case-by-case basis. The company should make an informal (letter) inquiry, and if it was appropriate, the FCC would bypass the SHPO. Mr. Steinberg said that there was an internal discussion about how the FCC should handle "past-30 day procedure," and that the FCC was obligated to make a ruling.

Several other members of the audience addressed the issue of the effects of communications towers on migratory bird behavior and asked what the current requirements that

must be considered in constructing a communications tower in compliance with the MBTA. Mr. Steinberg stated that there was no consensus on the cause of the phenomenon and that the USFWS had published interim guidelines for building towers and antennas that should be consulted, but those were only advisory and not binding. When asked about categorical exclusions under the Act, the speaker stated that it was unclear whether a categorical exclusion could be made to exempt a developer from preparing an EA if an endangered or threatened species was present at a site. Mr. Steinberg advised developers to apply for an incidental take permit in situations where the harm was an unintended consequence of the project.

Another attendee stated that he had received a letter from the USFWS that discussed compliance with the ESA and found that the proposed undertaking would have no adverse effects. The letter went on to discuss mitigation of damages regarding the migratory bird situation. The questioner asked whether the provisions were mandatory or optional. Mr. Abeyta reiterated that the procedures regarding migratory birds were only advisory but recommended that the company should try to work with USFWS and to negotiate a long-term solution to reduce the harm from the towers. Mr. Abeyta stated that the FCC had also asked for an MOU with the USFWS regarding this issue. He stated that the effect of tower construction on migratory birds was not part of routine environmental processing, but could be considered under the "catch-all" provision of the NEPA rules. Another attendee stated that he had received recommendations from the SHPO regarding proposed tower site construction that conflicted with the procedures that the USFWS had told him to follow and could not do both. Mr. Abeyta reiterated that the company should contact the FCC, and let it negotiate a solution with the different agencies to resolve how the company could comply with the law.

A member of the audience asked how much tower construction the FCC anticipated as a result of the transition to digital television broadcasting. Ms. Shafran replied that the FCC did not expect all digital broadcasters to build, and that tower sharing was a common practice. She stated that there were currently approximately 31,000 broadcasters, but far fewer towers. In some markets, companies were evaluating whether they could reinforce existing analog towers; where this was not technically feasible, most companies would prefer to share with others. She noted that the towers "don't have to be huge, some are smaller than cell towers." Many could be located at high elevations to improve coverage and where the antenna and tower could be made shorter. Another member of the audience wanted to know how a developer could prepare an EA accurately predicting the effect communications tower construction could have in the future, as the cumulative impact of communications tower projects is another necessary factor to examine when evaluating the project's effect on the environment. The speaker advised that the CEQ published a free handbook, *Cumulative Impacts*, which provided guidelines to forecast what was reasonably foreseeable and subject to planning by a developer.

An attendee described a proposed tower construction site that was of religious and cultural significance to several tribes that his company had targeted for development. The proposed project was certain to have an undesirable aesthetic impact on the area. Mr. Abeyta suggested contacting the tribes to address their concerns anyway. He noted an applicant might not understand what the tribe wanted—the tribe might be using the consultation process to negotiate for something they did not articulate, and were using the construction approval as a bargaining chip. He said that the company should inquire about the project to see whether the

tribes might agree to a compromise, reminding the audience that the FCC made the final determination in any case. He also suggested that the prospective developer should explore other possible sites as well.

Someone else in the audience asked which bureau at the FCC dealt with inquiries regarding radio frequency (RF) exposure issues. Ms. King said the subject was handled by the Office of Engineering and Technology and that RF issues were confusing at times. Ms. King also stated that the PCIA would be holding a seminar on this issue soon.

Summary and Analysis

Many of the questions and issues addressed by the panel concerned issues which carriers and construction companies had encountered previously, and wanted to negotiate more efficiently in the future. Discussion often returned to the subject of the FCC's efforts to streamline regulations and expediting approval for tower construction. The FCC's ability to update the proposed database and provide information on the various issues and entities involved in regulating environmental, historical, and other aspects of communications tower construction, will become a valuable asset. The PSWN Program can get copies of the Application for a Tower Site (FCC Form 854) and Application for a License for a Broadcast Antenna (FCC Form 301) for the library, and other useful FCC forms. The CEQ's publication, *Cumulative Impacts*, on the effects of multiple tower construction on the environment, may also be obtained to help anticipate compliance issues that might occur in supporting state and tribal project planning. Mr. Cohen expressed an interest in meeting with PSWN Program officers and management, or possibly serve as a speaker regarding environmental compliance issues for a future symposium or meeting. Because of the impact of environmental issues on public safety interests, the PSWN Program, through an education and outreach program, can assist applicants in meeting compliance requirements. These principles could even be applied to other government and commercial communications initiatives, and in negotiations with other agencies and authorities that regulate tower construction and communications operations.